80-1455

No.

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IN THE

Supreme Court of the United States

October Term, 1980

MACK ELMOND COTTON
Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the admission into evidence of the testimony of a witness who was given immunity from prosecution for perjury in connection with his testimony given at the petitioner's trial rendered him incompetent and thus denied the petitioner due process of law.

2. Whether the admission into evidence of statements made by a person who did not testify at the petitioner's trial violated the petitioner's right to confrontation.

3. Whether, under the peculiar facts of this case, an acquittal of the petitioner upon charges arising from the offenses for which he was herein convicted, predicated upon the same evidence adduced at the instant trial, barred prosecution and conviction of the petitioner herein under the double jeopardy clause of the Fifth Amendment.

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MACK ELMOND COTTON

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v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Mack Elmond Cotton, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on November 21, 1980.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 631 F.2d 63, and is reproduced in the appendix hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered in this case on November 12, 1980. A timely filed petition for panel rehearing was denied on December 22, 1980.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the due process clause and the double jeopardy clause of the Fifth Amendment, and the confrontation clause of the Sixth Amendment, all of which are reproduced at Appendix B.

STATEMENT OF THE CASE

The petitioner's involvement in counterfeit currency, as shown by the Governn.ent's evidence, from December 1976 to February 1977 led to the return of three indictments against him, and three trials at which he was, chronologically, acquitted, granted a mistrial because of a hung jury, and finally convicted of three of the four counts charged.[1] The facts of the case, as construed most favorably to the Government, are accurately summarized in the Court of Appeals' opinion. 631 F.2d at 64-65, App. A. 1a-3a. The facts relevant to the questions presented are as follows:

---

[1]The petitioner was first indicted in the Western District of Texas on March 1, 1977 for conspiracy and possession of counterfeit money. (Cause No. A-77-CR-17.) His trial upon this indictment in 1978 resulted in a mistrial because of a hung jury.

He was next indicted in the Northern District of Texas for possession of and attempting to pass a counterfeit bill. (Cause No. CR3-77-87). A jury acquitted him on this charge in 1978.

He was indicted next on December 12, 1978 in the Northern District of Texas, and the trial of that case led to the conviction herein.

The immunity from perjury issue

The petitioner, Calvin Eugene Etley and others were arrested in February 1977 in connection with counterfeit money charges. A grand jury for the Western District of Texas sitting in Waco, Texas, heard the matter in early 1977. Etley testified before that grand jury in response to a subpoena. He gave a false, exculpatory explanation of his conduct. At no time prior to such grand jury testimony was he given immunity from prosecution by the Government for any reason. Etley was subsequently indicted by that grand jury, and he was thereafter convicted upon that indictment. *See United States* v. *Etley,* 574 F.2d 850 (5th Cir. 1978), *cert. den.* 439 U.S. 967 (1978).

In preparation for the trial of this case, the Government sought Etley's testimony. What occurred thereafter is summarized in the following document written and executed shortly before the trial of this case began.

"[Letterhead omitted]

May 25, 1979

Mr. Dan C. Guthrie, Jr.
Assistant United States Attorney
16G28 U.S. Courthouse
1100 Commerce Street
Dallas, Texas 75242

Re: Calvin Eugene Etley

Dear Mr. Guthrie:

"This will confirm our agreements concerning the treatment and testimony of Calvin Eugene Etley in connection with the case of *United States* v. *Mack Elmond Cotton,* Cause No. CR3-78-298.

"I have advised my client to invoke his Fifth Amendment privilege when called upon to testify in the *Cotton* case. I anticipate that he will follow that advice.

"You have agreed that when he does invoke his privilege, you will grant him immunity in substantially the following terms:

> 'The United States grants Mr. Etley immunity from indictment and prosecution for any crime or offense, except any of which he has already been convicted, arising out of or related to any activities between December 1, 1976, and February 12, 1977, inclusive, involving counterfeit money or arising out of or related to his testimony given in this case, including any perjury committed in the course of his testimony in this case before the federal grand jury in Waco, Texas.'

"You have further agreed to use your best efforts to arrange for Mr. Etley not to be held in the Dallas County Jail for any reason related to or connected with his appearance or testimony in the *Cotton* case. Should it be necessary for Mr. Etley to be in attendance for the Cotton trial for more than one day, he will not be held over in the Dallas County Jail and other arrangements will be made for him.

"Upon your signing in the space provided below, confirming that the foregoing does represent our agreement, I have agreed to advise Mr.

Etley that he may speak with you about his testimony in advance of being put on the stand.

Yours very truly,

/s/ A.B. Connat, Jr.
A.B. Connat, Jr.

ABC, Jr/tg

AGREED:

/s/ Dan C. Guthrie, Jr.
Dan C. Guthrie, Jr.
Assistant United States Attorney"

When called to testify by the Government at the petitioner's trial, Etley invoked his Fifth Amendment privilege. The Government then read to the trial court the above quoted document. Etley then testified at the petitioner's trial over the objection that he was an incompetent witness, having been given immunity from perjury committed in the course of the testimony given at the trial. Etley directly and pointedly implicated the petitioner on Counts one, three and four. Inexplicably, his testimony regarding count two was exculpatory as to the petitioner. Not surprisingly, the jury accepted Etley's testimony completely, convicting the petitioner of Counts one, three and four, and acquitting him on Court two.

The confrontation issue

Joyce Read, who was indicted and convicted in 1977 as Etley's co-defendant, see *United States* v. *Read, aff'd sub nom. United States* v. *Etley, supra,* refused to testify based on her Fifth Amendment privilege when she was called to testify at the petitioner's trial by the Government. She did not thereafter testify at the trial.

Subsequent to Read's refusal to testify, the Secret Service agent in charge of this case (Stephen Beauchamp) was called to testify by the Government. He was cross-examined *inter alia* about statements he allegedly made to several persons in the course of his preparation for this trial to the effect that he "was going to get the petitioner" in an effort to show bias and prejudice. Among those persons to whom Beauchamp spoke prior to the trial and to whom he allegedly made such statements was Joyce Read. The cross-examination about this matter occurred thusly:

"Q. Have you talked with Joyce Read in the past few months?

A. Yes, I have.

Q. Did you request her to appear here to testify in behalf of the Government against Mack Cotton?

A. I talked to her and asked her as to her willingness to testify at the instruction of [the assistant United States Attorney who prosecuted this case].

Q. Did you make any statement to her that, 'I am going to get Mack Cotton on this case if not another case'?

A. No, sir; I did not."

Immediately thereafter, the following occurred on the Government's redirect examination of Beauchamp:

"REDIRECT EXAMINATION

BY MR. GUTHRIE:

Q. Let me ask you, Mr. Beauchamp. If, pursuant to my instructions, we made ar-

rangements for Joyce Read to appear in my office?

A. That's correct.

Q. And did Joyce Read have a conversation with us regarding her willingness to testify in this case?

A. Yes, sir; she did.

Q. Would you tell the members of the jury what Joyce Read told us in my office when we inquired of her as to her willingness to appear to testify?

MR. BRUDER [Defense counsel]: Objection. Confrontation. Denies confrontation, Your Honor.

THE COURT: I will overrule. You opened it up, Mr. Bruder.

A. She said she feared for her life and the life of her twelve-year-old daughter, that she was afraid of retribution by Mack Cotton, by Mack Cotton's friends, by Calvin Etley or Calvin Etley's friends."

In a letter to the trial court after the trial but prior to sentencing, Joyce Read denied making the statements attributed to her by Beauchamp.

The double jeopardy issue

The petitioner was first tried upon the indictment charging him with possession of and attempting to pass a counterfeit bill. During his trial in 1977 in Cause No. CR3-77-87, the Government adduced all of the evidence,

testimonial and physical, that was used in this trial, with the exception of Etley's testimony, which was unique as to this trial.[2] The petitioner did not testify at the 1977 trial, nor did he put on any evidence. The sole issue for the jury's resolution at that trial was whether the petitioner acted with guilty knowledge and intent.

In his charge to the jury, the trial court in the 1977 trial instructed the jury that evidence of other crimes, i.e., crimes not charged in the indictment, could properly be considered by the jury to determine the petitioner's knowledge and intent, but only if the jury first found beyond a reasonable doubt that the petitioner had committed the other crimes. The jury acquitted the petitioner.

By timely filed motions prior to this trial, the petitioner raised the double jeopardy issue, contending that the jury's verdict in Cause No. CR3-77-87 necessarily included a finding by that jury that the petitioner was not guilty of the "other offenses" raised in that case, which "other offenses" were the offenses charged in the indictment in this case.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals failed to address the immunity from perjury issue because they wholly misconstrued the facts underlying the issue. Certiorari is necessary to have the issue resolved upon the correct relevant facts. Moreover, a resolution of the issue by this Court is appropriate since it is an issue of first impression in the federal court system.

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[2]Etley's testimony, which was given at the trial of this case, was the only evidence, testimonial and physical, not common to the trials of the petitioner; and Etley was the only material witness not common to the three trials.

2. The Court of Appeals erred in failing to address the confrontation issue on the constitutional grounds presented, and erroneously relied upon an 'invited error' theory to avoid the constitutional issue. Certiorari should be granted to provide consideration of the issue on the constitutional grounds raised, and to resolve a conflict among two courts of appeals on the precise issue presented.

3. The Court of Appeals unduly restricted application of the doctrine of collateral estoppel in denying the petitioner's double jeopardy claim. Certiorari should be granted (a) to allow for a correct application of that doctrine, and (b) to consider the formulation and adoption of requirement that all offenses intended to be proved at one trial be joined for purposes of trial and application of double jeopardy protection.

ARGUMENT

I.

The record unquestionably reflects that Etley was not granted immunity by the Government until immediately prior to the trial of this case in 1979. Etley was not granted immunity by the Government prior to testifying before the Waco grand jury in 1977. The only grant of immunity given by the Government to Etley occurred only days before the commencement of this trial and specifically related to Etley's testimony to be given at this trial.

The Court of Appeals summarily disposed of the issue by creating, out of whole cloth, a totally inaccurate version of the relevant facts. The court wrote:

> "Nowhere in the record is there any evidence that Etley was granted immunity from perjury for his

> testimony at the instant trial either by the government or by the judge. *Apparently, Etley had been granted immunity before a Waco grand jury, but that grant had nothing to do with his testimony in the present trial.*

United States v. *Cotton, supra,* at 65 (emphasis supplied). There is nothing in the record that even suggests the factual situation portrayed by the lower court in the quoted portion of their opinion. For whatever reason, the court failed to identify and recognize the facts upon which the issue was predicated. In all fairness, the petitioner is entitled to have his issues resolved upon the accurate facts of his case.

The grant of immunity to Etley is specific and unambiguous: "The United States grants Mr. Etley immunity from indictment and prosecution for any crime or offense . . . arising out of or related to his testimony given in this case [i.e., *United States* v. *Cotton,* No. CR-378-298], including any perjury committed in the course of his testimony in this case before the federal grand jury in Waco, Texas." Perjury is a crime or offense arising out of or related to testimony given under oath at the trial of a case in federal courts. 18 U.S.C. § 1621. Thus, by immunizing Etley from prosecution for "any crime or offense . . . arising out of or related to his testimony given in this case" the Government immunized Etley from prosecution for perjury. The concluding phrase of the immunity grant – "including any perjury committed in the course of his testimony in this case before the federal grand jury in Waco, Texas" – emphasizes the conclusion that the grant of immunity to Etley included immunity from perjury committed during his testimony given at the trial of this case.

The threat of punishment for testifying falsely has long been the *sine qua non* to the competence of a witness to give testimony. The history of the common law teaches us that before a person was permitted to give testimony he had to swear an oath to a Supreme Being to tell the truth and he had to express his belief in a Supreme Being, thereby subjecting himself to the vengeance of a God who avenged falsehood. *United States* v. *Miller,* 236 F. 798 (W.D. Wash. 1916); *United States* v. *Lee,* Fed. Cas. No. 15586 [4 Cranch, C.C. 446]; *Wakefield* v. *Ross,* Fed. Cas. No. 17050 [5 Mason, 16]. Constitutional infirmities in such reasoning and a more sophisticated approach to testing the qualifications of prospective witnesses led to the substitution of punishment by a temporal power as the sanction for giving false testimony. *Priest* v. *State,* 10 Neb. 393, 6 N.W. 468 (1880); *State* v. *Levy,* 23 Minn. 104 (1876); *Snyder* v. *Nations,* 5 Blackf. 295 (Ind. 1840). The religious obligation of the oath was supplanted by the awareness of perjury prosecution as the test for competence to testify. Thus, it has been held that "one who is not amenable to punishment for perjury is not a competent witness." *Santillian* v. *State,* 147 Tex. Crim. 554, 182 S.W.2d 812, 813 (1944). As noted at 6 *Wigmore on Evidence* § 1831 (Chadbourn rev. 1976), the penalty of perjury "is a real and powerful security for truth telling, and its function has been only the more emphasized since the general recognition of the dispensability of the oath." The federal general immunity statute, 18 U.S.C. § 6002, recognizes that the threat of perjury prosecution is absolutely essential to the competence of a witness to give testimony in that it excepts perjury as an offense for which immunity can be given in return for testimony.

While it may seen inconceivable that the Government would immunize Etley from perjury in return for his

testimony, the issue is not what may or may not have been reasonable from the Government's standpoint. Rather, the issue is whether Etley, aware of the immunity from perjury granted to him, polluted the petitioner's trial with false testimony. Whether granted intentionally or by mistake, the immunity from perjury clearly inherent in the grant of immunity to Etley removed any threat to Etley of prosecution for perjury for the testimony he was to give and did give at the petitioner's trial. Etley was free to say whatever would further his interests, such as testimony favorable to the Government in return for future favors regarding parole, or place of confinenment for the duration of his sentence, without regard for the truth of such testimony. Etley was a self-confessed perjurer who frankly admitted he would lie to further his personal interests. He freely admitted during his testimony given at the petitioner's trial that when he appeared before the Waco grand jury, he lied about his involvement in the counterfeiting scheme that gave rise to his conviction and to this case in an effort to persuade the grand jury not to indict him. Etley established himself as an astute man who understood how to help himself. The bargaining that preceded the grant of immunity, and especially the alterations appearing on the document granting him immunity (all of which relate to perjury), establish Etley's awareness of his situation and of the full scope of the grant of immunity under which he testified against the petitioner.

That a previous jury acquitted the petitioner, that another previous jury could not agree on his guilt, and that the jury in this case convicted the petitioner upon the three counts about which Etley testified that the petitioner was guilty and acquitted the petitioner upon the one count about which Etley said the petitioner was not guilty are not a series of mere coincidences. They pointedly show that

Etley's testimony provided crucial weight to the Government's case. His competence to testify is thus a critical issue in evaluating the validity of the petitioner's conviction since it obviously affected the jury's determination in this case of the petitioner's guilt or innocence. Etley's immunization from perjury is certainly not harmless error.

Inasmuch as this issue is one of first impression[3] in the federal courts, and since the Court of Appeals failed to address the issue in its accurate factual setting, and, most importantly, since the issue goes to the heart of the fact-finding function of the jury, this Court should grant certiorari to fully consider the issue.

II.

The admission into evidence of the statement purportedly made by Joyce Read, who invoked her Fifth Amendment privilege when called to testify, to a Government agent that she would not testify against the petitioner because she feared that he or Etley would harm her or her twelve year old daughter if she did testify presents a classic denial of confrontation. *See, e.g., Bruton* v. *United States,* 395 U.S. 123 (1968); *Parker* v. *Gladden,* 385 U.S. 363 (1966); *Douglas* v. *Alabama,* 380 U.S. 415 (1965); *Pointer* v. *Texas,* 380 U.S. 400 (1965). From the reading of the indictment prior to the trial and from the evidence already adduced, the jury was aware that Read was accused

[3]This case does not involve a fact situation where immunity was granted and no mention of perjury was made. In such a situation the courts infer that immunity from perjury was not included in a general grant of immunity from prosecution in return for testimony. This case is predicated upon, and the issues stand or fall upon the proposition that the Government is free to confer immunity from perjury, whatever the merits of such a grant of immunity may be, and that the Government did grant Etley immunity from perjury in this case, whether by design or indifference.

of full complicity in the crimes charged against the petitioner and Etley. The statements attributed to her by the agent implanted in the jury's mind a criminal connection between the petitioner and Etley, thus adding credence to the substance of his testimony, and showed the petitioner to be a violent person.

The Court of Appeals for the Seventh Circuit, when confronted with an almost identical fact situation, concluded that the alleged statements of an individual who did not testify to the effect that the accused had threatened him, made the non-testifying individual a witness against the accused without affording him an opportunity to cross-examine such person about the alleged statements, thereby denying the accused his right of confrontation. *United States* v. *DeStefano,* 476 F.2d 324, 331-332 (7th Cir. 1973).

In this case the Court of Appeals declined to address the confrontation issue, holding that "[o]nce defense counsel inquired into the area of Read's willingness to testify, . . . the government had the right on rebuttal to clarify that issue . . ." *United States* v. *Cotton, supra,* at 65. Several reasons compel a review of this issue on constitutional grounds. First, defense counsel did not inquire into the area of Read's willingness to testify, as suggested by the lower court. Defense counsel, in thoughtfully phrased questions carefully designed to avoid precisely what occurred, inquired if the agent had requested Read to testify for the Government. No questions were asked by defense counsel about Read's willingness to testify. The subject of Read's willingness to testify was opened up by the agent's unresponsive answer to one of defense counsel's questions that sought only an answer to whether the agent had requested Read to testify. Defense counsel's line of inquiry

was aimed at eliciting whether the agent had made statements to Read about the petitioner, not at whether Read had made statements to the agent about the petitioner. Second, defense counsel asked the agent if he had a conversation with Read, and specifically avoided asking the agent anything about the substance of such conversation. The agent was only asked if he (the agent) had made certain statements to Read during the conversation. Thus, anything Read had to say to the agent was not admissible under any theory that the petitioner opened the door to the admission of all of the conversation by inquiring into a part of the conversation. Once the agent denied making the statements to Read about which the inquiry was directed, further inquiry about the substance of the conversation between Read and the agent was foreclosed. The petitioner did not waive his right to confront Read, as the Court of Appeals implied, and he is entitled to have that right enforced by this Court.

The tactic of eliciting Read's alleged statement to the agent is not unlike what occurred in *Douglas* v. *Alabama, supra,* where the substance of an out-of-court statement made by a person who refused to testify when called as a witness was placed before the jury. At the time the complained of testimony was elicited the prosecutor knew that the petitioner could not rebut or refute the agent's testimony because the only person who could do so — Read — had already indicated she would not testify. To the extent that *DeStefano* deals with the same issue as is presented here and reaches a contrary result, certiorari is appropriate to resolve the conflict and to insure proper application of this Court's holdings in *Pointer* and *Douglas.*

III.

> "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

Ashe v. *Swenson,* 397 U.S. 436, 443 (1970). To determine if a previous judgment of acquittal based upon a general verdict bars a subsequent prosecution, the court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444. An analysis of the relevant facts reveals the following:

The United States first tried the petitioner upon a substantive charge of attempting to pass counterfeit currency. At that trial the Government adduced all of the evidence, testimonial and physical, that was used at the trial of this case, with the exception of Etley's testimony and Read's alleged statement. The petitioner was positively identified as the person who tendered a counterfeit bill in exchange for the purchase of some merchandise. The petitioner did not testify nor did he present any defensive evidence. No issue was made as to his identity or the counterfeit nature of the bill. It was thus uncontroverted that the petitioner had committed all of the physical elements of the offense. The sole issue presented to the jury for their decision was the petitioner's intent. In an effort to establish the requisite criminal intent, the Government offered evidence that the petitioner had committed numerous other offenses, including the offenses that were charged in this case and of which the petitioner was herein

convicted. The district court charged the jury on the applicability of such other offenses in the following terms:

> "The fact that the defendant may have committed an offense at some time is not any evidence or proof whatever that, at an (sic) another time, the defendant committed the offense charged in the indictment, even though both offenses are of a like nature. Evidence as to an alleged later offense of a like nature may not therefore be considered by the jury, in determining whether the defendant committed the offense charged in the indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first find that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did those acts he is charged in the indictment with having done.
>
> "If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused did those acts he is charged in the indictment with having done, then the jury may consider evidence as to an alleged later offense of a like nature, in determining the knowledge and intent with which the defendant committed the offense charged in the indictment . . . ."

The jury acquitted the petitioner.[4]

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[4]This issue does not involve Wharton's Rule, and the petitioner is not relying upon it. Accordingly, *Iannelli v. United States*, 420 U.S. 770 (1975), is not dispositive of the issue.

After a second trial upon conspiracy and substantive counterfeiting offense charges that resulted in a hung jury, the United States brought the indictment that resulted in the convictions herein.

Throughout the trials referred to above there was an identity of parties[5] and a virtual identity of evidence. In particular, at the first trial of the petitioner, the Government proved the commission of the offenses charged in the indictment in the instant case.

The only issue which the jury in the petitioner's first trial had to resolve was the petitioner's intent. The jury was specifically instructed that the evidence of other offenses (including those for which the petitioner was convicted herein) was relevant to a determination of the ultimate issue – intent, but that such evidence of other offenses could be considered only if the jury believed beyond a reasonable doubt that the petitioner had committed those other offenses. With their attention clearly focused on the issue of intent, and armed with the court's instructions regarding the applicability of the evidence of the other offenses, the jury presumably based its verdict in the petitioner's first trial upon the issue which he now seeks to foreclose. An inquiry into this matter "set in a practical frame and viewed with an eye to all the circumstances of the proceedings," *Sealfon* v. *United States,* 332 U.S. 575, 579 (1948), clearly establishes that the Government, by sheer weight of the evidence of other offenses and by its jury argument in the petitioner's first trial, sought to convince that jury of the petitioner's criminal intent through proof of the other offenses. To the extent any clarification of what the ultimate issue in the case was, the court's

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[5]This case does not involve the doctrine of nonmutual collateral estoppel. See *Standefer v. United States,* 100 S.Ct. 1999 (1980).

charge to the jury provided it. Assuming, as we must, that the jury followed the court's charge, they necessarily determined the applicability of the evidence of other offenses to the issue of intent. By returning a not guilty verdict, the jury had to conclude that the evidence of the other offenses was not applicable for consideration on the issue of intent. The only way the jury could have returned a "not guilty" verdict was to have resolved the issue of intent in favor of the petitioner; and the only way they could have done that under the evidence and the court's instructions was to find that he did not commit the other offenses. Thus, the jury's verdict in the petitioner's first trial resolved the ultimate issue of fact litigated in the instant case — the petitioner's guilt of the charges brought in this case.

The Court of Appeals rejected the petitioner's argument because the jury in the first trial was "not required to consider evidence of other crimes" and their consideration of the petitioner's guilt of the other offenses "was not necessarily the dispositive nor (sic) necessary element of the jury's decision." *United States* v. *Cotton, supra,* at 66. The Court of Appeals applied a more restrictive test than is called for by *Ashe* v. *Swenson.*

This Court should grant certiorari on this issue to consider whether the Court should exercise its supervisory powers over the federal courts and adopt a rule requiring joinder of offenses chargeable against an accused raised by the evidence adduced at the trial of any one offense. The formulation of such a rule would avoid the terrible waste of judicial resources such as were expended in trying the petitioner three times before finally securing a conviction, would reduce the burdensome litigation expenses inherent in situations such as this, and would eliminate any unfairness in multiple prosecutions of an accused.

Subjecting an accused to defend himself three times against the same evidence, albeit the names of the offenses are slightly varied each time, is harassing to an individual, and affords the prosecution unfair leverage by permitting them to successively touch up previous trials with different evidence. *See Ashe* v. *Swenson, supra,* at 454-457 (concurring opinion of Mr. Justice Brennan, joined by Mr. Justice Douglas and Mr. Justice Marshall).

CONCLUSION

For the reasons stated above, the petitioner respectfully prays that the Court grant certiorari in this case to consider the issues raised and discussed herein.

Respectfully submitted,

Melvin Carson Bruder
BRUDER & COOPER

2514 Cedar Springs Road
Dallas, Texas 75201
(214) 742-3224

CERTIFICATE OF SERVICE

I, Melvyn Carson Bruder, hereby certify that I served one copy of the foregoing Petition for Writ of Certiorari upon counsel for the Government, the United States, by depositing the same in the United States mail in Dallas, Texas, enclosed in a suitable wrapper, with sufficient prepaid postage affixed thereto, addressed as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C.

The Honorable Kenneth Mighell
United States Attorney
1100 Commerce Street
Dallas, Texas 75201

Done this 18th day of February, 1981.

MELVYN CARSON BRUDER

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MACK ELMOND COTTON,
Defendant-Appellant.

No. 79-5392

United States Court of Appeals,
Fifth Circuit.

Nov. 21, 1980.

Appeal from the United States District Court for the Northern District of Texas.

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

GARZA, Circuit Judge:

On December 24, 1976, the appellant Mack Elmond Cotton attempted to pass a counterfeit $50 bill at a liquor store in Dallas, Texas. He was interviewed at the time by a secret service agent, who concluded that Cotton had been an innocent purchaser and allowed him to go. A short time

later, after review of that agent's report, another secret service agent began an investigation of the matter. In early 1977, the Secret Service recruited James P. Vouras to assist as a paid informant in the investigation of Cotton. Vouras was a convicted felon and acquaintance of Cotton.

Vouras contacted Cotton to discuss "hot diamonds." Without any additional prompting, Cotton told Vouras that he knew of a very good printer. The two met again a few days later at which time Cotton displayed some currency bills to Vouras. Vouras acted interested in the money, and the two discussed a sale of counterfeit bills ranging from $100,000 to half a million dollars at thirty percent. At that time, Cotton gave Vouras one counterfeit $50 note and three counterfeit $20 notes. Following two additional meetings, Vouras met with Cotton and co-conspirators Joyce Read and Gene Etley. Vouras gave Cotton $900 supplied by the government, and he then obtained one hundred forty-nine counterfeit $20 bills from the glove compartment of Cotton's truck.

Shortly thereafter, Read, Etley, Cotton and his wife were arrested on the highway between Austin and Dallas. Counterfeit currency totaling $150,000 was found in a box in the car. Etley was found in possession of two of the $100 bills which Cotton had received earlier from Vouras.

On March 1, 1977, Cotton was indicted in the Western District of Texas for conspiracy to violate the federal counterfeiting laws and for possession of counterfeit money, in violation of 18 U.S.C. §§ 2, 471, 472 and 473. This indictment concerned an alleged conspiracy beginning in July of 1976, and continuing until Cotton's arrest in February of 1977. The trial resulted in a mistrial due to a hung jury. On March 15, 1977, Cotton was indicted in the Northern District of Texas for attempting to pass a

counterfeit bill at the liquor store in Dallas. Cotton was acquitted of that charge.

On December 12, 1978, Cotton was indicted in the Northern District of Texas for possession of and attempting to pass counterfeit bills in violation of 18 U.S.C. §§ 472 and 473. This indictment specifically concerned the actions that occurred between Cotton and Vouras on February 11, 1977. On February 9, 1979, Cotton was charged in a superseding indictment in the Northern District of Texas with conspiracy to defraud, possess and conceal counterfeit money and to buy, sell, and exchange, transfer, receive and deliver such counterfeit money, in violation of 18 U.S.C. §§ 472 and 473, and with intentional possession and concealment of counterfeit money and the sale, transfer and delivery of such notes. Count one of the indictment concerns the same alleged continuing conspiracy charged in the first indictment in 1977. Counts two, three and four concern the transactions between Cotton and Vouras. Cotton was convicted on Counts one, three and four.

Cotton now raises four issues on appeal. Cotton contends that the was denied his right of confrontation, that a government witness should have been disqualified since he allegedly was granted immunity from prosecution for perjury, that the prosecution committed error in final argument and that the trial which resulted in his conviction violated his rights against double jeopardy.

[1] Cotton's first challenge concerns testimony by a secret service agent regarding statements made by Joyce Read after defense counsel informed the court that Read would invoke her Fifth Amendment privilege. The government, however, contends, that during an interview between Read and a secret service agent, she had not in-

dicated a desire to invoke her Fifth Amendment rights. On cross examination of the secret service agent, defense counsel asked the agent whether he knew Read, whether he had spoken with her and whether he had asked about her willingness to testify. Defense counsel also inquired of the agent whether he had made any statements to Read. On re-direct, the government asked the agent whether Read had ever said anything to the agent regarding her willingness to testify. Defense counsel objected to that question on the grounds that his client would be denied his right of confrontation. The trial court overruled the objection, stating that defense counsel had opened the door to that line of testimony. The agent then related that Read had told him that she feared for her life and the life of her twelve year old daughter because of possible retribution by Cotton and Etley or their friends.

This court finds no error in trial court's overruling of defense counsel's objection. Once defense counsel inquired into the area of Read's willingness to testify, probably in hopes of persuading the jury that the agent exerted undue influence upon Read, the government had the right on rebuttal to clarify that issue, by attempting to remove any stigma created by defense counsel's questioning. *See United States* v. *Delk*, 586 F.2d 513, 516 (5th Cir. 1978).

[2] Cotton's second challenge concerning the granting of immunity from perjury charges to Etley, a government witness, is wholly without merit. Nowhere in the record is there any evidence that Etley was granted immunity from perjury for his testimony at the instant trial either by the government or by the judge. Apparently, Etley had been granted immunity before a Waco grand jury, but that grant had nothing to do with his testimony in the present trial.

[3] Cotton also contends that the prosecutor committed reversible error during final argument. The prosecutor in his closing argument defended the secret service agents who testified by stating that they were men who protected the President of the United States and that they were not the type of men to take the stand and risk their careers by lying merely for the sake of convicting Cotton. The prosecutor also stated that such tactics would probably involve him, as well, by his suborning of the agents' perjury.

Cotton contends that such remarks went beyond the bounds of prosecutorial comment. We cannot agree that such comments were prejudicial error in light of the surrounding circumstances. In this case, defense counsel in his final argument had attempted to portray the secret service agents as liars due to their desire to convict Cotton. Defense counsel also referred to cover up attempts by the government. In light of this preceding argument, the government was completely within its right to try to rebut defense counsel's argument in the way it did. *See United States* v. *Downs,* 615 F2d 677, 678 (5th Cir. 1980); *United States* v. *Handly,* 591 F.2d 1125, 1132 (5th Cir. 1979). Even if it could be considered as error, which this court does not, it would be harmless because, based upon the entire record, there is no evidence of substantial prejudice to Cotton, and the evidence of his guilt is extremely strong. *See United States* v. *Miranda,* 593 F.2d 590, 596 (5th Cir. 1979); *United States* v. *Morris,* 568 F.2d 396, 402 (5th Cir. 1978). *See also Cobb* v. *Wainwright,* 609 F.2d 754, 755 (5th Cir. 1980) (court must consider possible prosecutorial misconduct in context of trial as a whole).

In Cotton's final attack on his conviction, he contends that the jury in his prior trial for the attempted passing of a counterfeit note at the Dallas liquor store considered evidence which was used in the instant case. Cotton argues

that such consideration by the jury bars prosecution of this case under the principle of collateral estoppel. The facts supporting the indictment in that earlier case in which Cotton was acquitted were not the bases for the indictment in the present case. Further, in the earlier case, the trial judge had informed the jury that they were not to consider evidence of any other crime besides the attempted passing of the counterfeit note at a liquor store unless they believed that the defendant had committed such other crime, and then only to show the defendant's intent in attempting to pass the counterfeit bill. Thus, the jury in that case was permitted but not required to consider evidence of other crimes, and it was not a necessary part of the jury's determination in deciding whether Cotton knowingly attempted to pass the counterfeit notes at the liquor store in Dallas.

[4, 5] The doctrine of collateral estoppel may be raised when an issue of ultimate fact has been determined by a valid and final judgment, precluding the re-litigation of that issue between the same parties in any future lawsuit. *United States* v. *Lee,* 622 F.2d 787, 789 (5th Cir. 1980). Thus, collateral estoppel will preclude a subsequent prosecution only if the jury could not rationally have based its verdict on an issue other than the one the appellant seeks to foreclose. *Id.* at 790. If a fact is not necessarily decided in a prior trial, the possibility that it might have been does not prevent re-examination of that issue in a subsequent trial. *Id.; United States* v. *Ballard,* 586 F.2d 1060, 1064 (5th Cir. 1978). Thus, the fact that the jury in that earlier case had been permitted to consider the evidence of other crimes was not necessarily the dispositive nor necessary element of the jury's decision, and Cotton is unable to invoke the doctrine of collateral estoppel in this case.

Based upon a thorough examination of the entire record, this court finds no errors in the proceedings below.

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-5392

D.C. Docket No. CR-3-78-298

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MACK ELMOND COTTON,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby affirmed.

November 21, 1980

APPENDIX B

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V provides, in relevant part, that:

> "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of . . . liberty . . . without due process of law . . ."

Amendment VI provides, in relevant part, that:

> "In all criminal prosecutions, the accused shall be confronted with the witnesses against him . . ."

APPENDIX C

PETITION FOR PANEL REHEARING
IN
UNITED STATES v. *COTTON*

No. 79-5392

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MACK ELMOND COTTON,
Defendant-Appellant.

PETITION FOR PANEL REHEARING

TO THE HONORABLE CHARLES CLARK, GERALD BARD TJOFLAT, AND REYNALDO G. GARZA, CIRCUIT JUDGES:

Comes now MACK ELMOND COTTON, defendant-appellant in the above entitled and numbered case, and files this Petition for Panel Rehearing.

Rehearing is sought because the Court has completely misconstrued critical facts and has thereby created a distorted factual basis for its holding. The defendant also urges the Court to directly address the confrontation issue raised in this case.

I

Factual errors

A.

The immunity issue

The defendant contended in his brief that the government had granted Etley, a government witness, immunity from perjury, thereby rendering Etley incompetent to testify. *Brief of the Appellant* 11-11a, 16-18, 20-22. The panel responded to this claim with the following factual summary – a summary that the record clearly shows to be patently inaccurate:

> . . . Nowhere in the record is there any evidence that Etley was granted immunity from perjury for his testimony at the instant trial. Apparently, Etley had been granted immunity before a Waco grand jury, but that grant had nothing to do with his testimony in the present trial.

United States v. *Cotton,* slip opinion, pp. 1434-1435.

A "thorough examination of the entire record" clearly reveals that the panel has grievously misconstrued the facts relevant to this issue. In truth and in fact. Etley was not granted immunity before the Waco grand jury. In truth and in fact, the record is replete with evidence that

the government granted Etley immunity from prosecution for perjury committed during the course of his testimony given at the instant trial. These two matters will be discussed in reverse order.

1.

This Court's *assumption* that Etley was granted immunity before the Waco grand jury is, quite simply, not true;[1] nor is it supported by the record. Etley testified before the Waco grand jury in February 1977. *Transcript of Proceedings* (hereafter "Tr.") 328. The only mention in the record of any grant of immunity to Etley refers to the immunity conferred immediately prior to the instant trial, as evidenced in the written agreement dated May 25, 1979 (Defendant's Exhibit No. 1, *Tr.* 561), and by the prosecutor's specific statements that Etley was being granted immunity for purposes of the defendant's trial. *Tr.* 327-329, 347-348, 438-440. Moreover, the grant of immunity conferred upon Etley immediately prior to the instant trial refers to Etley's appearance before the Waco grand jury as an historical event—something that had already occurred when Etley was granted immunity. Thus the record shows that Etley was granted immunity more than two years *after* he appeared before the Waco grand jury. The record affirmatively refutes the Court's assumption that Etley was granted immunity before the Waco grand jury.

To the extent it is necessary, it should be noted that the conclusion that Etley was given immunity before the Waco

[1]The undersigned counsel represented Etley prior to and during his appearance before the Waco grand jury and at Etley's trial for his involvement in this counterfeiting scheme. See *United States* v. *Etley* 574 F.2d 850 (5th Cir. 1978). So far as counsel is aware, Etley was not granted immunity prior to or at the time of his appearance before the Waco grand jury.

grand jury is illogical. Etley testified at the instant trial that he lied when he appeared before the Waco grand jury. *Tr.* 443-444, 486. The Waco grand jury indicted Etley and others (including the defendant) for their involvement in the counterfeiting scheme that serves as the basis for the defendant's conviction. (However, the indictment returned by the Waco grand jury is not the indictment upon which the defendant was convicted.) Etley was convicted by a jury upon the Waco grand jury's indictment. *United States* v. *Etley, supra.* It is obvious that if Etley had been granted immunity before the Waco grand jury he would not have been indicted, prosecuted and convicted for the offenses about which he presumptively testified under a grant of immunity.

2.

The grant of immunity given to Etley, which was memorialized in Defendant's Exhibit No. 1, reads, in pertinent part, as follows:

> "This will confirm our agreements concerning the treatment and testimony of Calvin Eugene Etley in connection with the case of *United States* v. *Mack Elmond Cotton,* Cause No. CR3-78-298.
>
> * * *
>
> "The United States grants Mr. Etley immunity from indictment and prosecution for any crime or offense, except any of which he has already been convicted, arising out of or related to any activities between December 11, 1976, and February 12, 1977, inclusive, involving

> counterfeit money or *arising out of or related to his testimony given in this case,* including perjury committed in the course of his testimony in this case before the federal grand jury in Waco, Texas."

Defendant's Exhibit No. 1. (Emphasis added.)[2] The prosecutor confirmed the content and meaning of Defendant's Exhibit No. 1 on several occasions during the defendant's trial.

> "Well, Your Honor, let me state for the record that we intended to grant complete immunity to the Defendant (sic) regarding his testimony. Anything that he testifies regarding, we would be precluded from proceeding to prosecution on and that's what we intended to cover in the actual statements which we read before the Court outside the presence of the jury earlier [referring to Defendant's Exhibit No. 1]."
>
> * * *
>
> "It applies to anything that he might testify about on the stand, yes, sir, as far as his personal immunity; yes, sir, it does."

Tr. 347-348.

The content and meaning of Defendant's Exhibit No. 1 is clear and unambiguous: Etley was granted immunity from indictment and prosecution for any crime or offense arising out of or related to his testimony given in the defendant's trial. Perjury is a crime or offense arising out

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[2]A copy of Defendant's Exhibit No. 1 is attached hereto. However, it is of poor quality and reference should be had to the record copy.

of or related to testimony given in a trial. A blanket grant of immunity given to secure testimony necessarily includes immunity from perjury, unless immunity from perjury is specifically excepted in the grant. This point was amply made when Congress enacted the general immunity statute: Congress specifically excepted perjury as one of the offenses that a grant of immunity in return for testimony would cover. 18 U.S.C. § 6002. Since perjury was not excepted from the blanket grant of immunity given to Etley, the only conclusion to be reached is that Etley was granted, and had at the time he testified at the defendant's trial, immunity from perjury in connection with his testimony given at the defendant's trial.

Finally, the inclusion in Defendant's Exhibit No. 1 of the phrase, "including any perjury committed in the course of his testimony in this case before the federal grand jury in Waco, Texas", leaves no doubt that Etley was granted immunity from perjury with respect to his testimony given at the defendant's trial. The blanket grant of immunity given to Etley reached all offenses arising out of or related to Etley's testimony given at the instant trial, without exception; thus, the special mention of perjury in the concluding phrase emphasizes the inclusion in the immunity grant of immunity from perjury.

3.

It is apparent that the Court has somehow formulated a totally distorted version of the factual context of the immunity issue. The Court apparently believed that Etley was granted immunity prior to his appearance at the Waco grand jury more than two year before the defendant's trial, and that the immunity discussed during the defendant's trial was but a carry-over of previously granted im-

munity. This is simply not true. Etley was not granted immunity before he appeared at the Waco grand jury. He was, for the first time, given immunity immediately prior to his testifying at the defendant's trial in this case. The record unquestionably supports this version of the facts respecting Etley's immunity, and it unequivocally and completely refutes the version of the facts formulated by the Court.

This Court has resolved a serious legal issue against the defendant upon a distorted and wholly untrue factual basis. The immunity issue was decided upon facts which simply do not exist. The defendant prays the Court will review the record to ascertain the true facts relevant to the immunity issue, and then proceed to resolve the issue in the context of the accurate facts. The argument contained in the defendant's original brief filed herein will persuade this Court to reverse his conviction upon the immunity issue, given the framework of the accurate facts relating to that issue.

B.

The confrontation issue

The defendant complained in his original brief of the government's elicitation of hearsay testimony in violation of the defendant's right to confrontation. The Court's recitation of the facts relevant to the issue is as follows:

> "Cotton's first challenge concerns testimony by a secret service agent regarding statements made by Joyce Read after defense counsel informed the court that Read would invoke her Fifth Amendment privilege. The government, however, contends that during at interview be-

> tween Read and a secret service agent, she had not indicated a desire to invoke her Fifth Amendment rights. On cross examination of the secret service agent, defense counsel asked the agent whether he knew Read, whether he had spoken with her and whether he had asked her about her willingness to testify. Defense counsel also inquired of the agent whether he had made any statements to Read. On re-direct, the government asked the agent whether Read had ever said anything to the agent regarding her willingness to testify. Defense counsel objected to that question on the grounds that his client would be denied the right of confrontation. The trial court overruled the objection, stating that defense counsel had opened the door to that line of testimony. The agent then related that Read had told him that she feared for her life and the life of her twelve year old daughter because of possible retribution by Cotton or Etley of their friends."

United States v. *Cotton,* slip opinion, p. 1435.

That Joyce Read's court-appointed counsel (who was not the same counsel that represented the defendant, contrary to the Court's apparent belief) advised the trial court, out of the jury's presence that Ms. Read would invoke her Fifth Amendment privilege if she were called to testify by the government, does not authorize the government to establish, before the jury, that Read may not at some distant time have relied upon that privilege. To the extent that the Court relies upon the conflict regarding Read's reasons for not testifying at the defendant's trial, the Court has overlooked the fact that the jury did not know that Read had exercised her Fifth Amendment privilege

when the government elicited the testimony of the agent regarding his conversation with Read prior to the trial.

However, the most important factual error regarding the confrontation issue is that defense counsel did not inquire of the agent whether he and Read discussed her willingness to testify against the defendant. The relevant colloquy is as follows:

> "Q. [By defense counsel] Have you talked to Joyce Read in the past few months?
>
> A. [By the secret service agent] Yes, I have.
>
> Q. Did you request her to appear here to testify in behalf of the Government against Mack Cotton?
>
> A. I talked to her *and asked her as to her willingness to testify* at the instruction of the prosecutor."

Tr. 840. Defense counsel *did not* inquire of the agent "whether he had asked [Joyce Read] about her willingness to testify." The agent was asked if he requested Read to testify at the trial. The question called for a simple answer, and not for an answer regarding any statements made by Read to the agent concerning her willingness *vel non* to testify. The agent's response to defense counsel's question that he "asked her as to her willingness to testify" was unresponsive and gratuitous. This Court's characterization that defense counsel affirmatively inquired whether the agent asked Read about her "willingness" to testify is inaccurate.

Such factual inaccuracy is critical to the extent that the Court said: "Once defense counsel inquired into the area of Read's willingness to testify, . . . the government had

the right on rebuttal to clarify that issue . . ." *United States* v. *Cotton,* slip opinion, p. 1435. Obviously, the lack of inquiry into the area forecloses the need to clarify the issue. An accurate summary of the facts precludes the disposition of the confrontation issue upon the grounds used by the Court, and should result in a proper disposition of a reversal of the conviction.

II.

Errors of law

The confrontation issue

This Court resolved the confrontation issue upon the "invited error" rule, In addition to the factual inaccuracies discussed under I B, above, the defendant urges this Court to apply its reasoning and holding in *Gibson* v. *United States,* 363 F.2d 146 (5th Cir. 1966). In that case a government agent was permitted to testify that he had heard several people make statements connecting the accused with the offense for which he was on trial. The government argued in that case that the complained-of testimony was admissible because the defense counsel "opened the door on cross examination." *Id.,* at 148. The Court replied:

> "True enough, appellant's lawyer interrogated the Agent with reference to the existence of Lucky Motors, its operation by Miller and the witness' knowledge as to the notarization of the bill of sale from Lucky Motors to appellant. Proper cross-examination on the Agent's knowledge of the affair, did not open the gates to an avalanche of hearsay testimony on what might have been said by other unidentified parties."

Id.

So, in this case, defense counsel's cross-examination of the secret service agent regarding the existence of a conversation between him and Read did not authorize the government to elicit the details of that conversation at a time when the government was aware that Read would refuse to testify under her Fifth Amendment privilege. The improper admission into evidence before the jury of hearsay, especially where confrontation issues are involved, is not generally curable by invocation of the "invited error' rule. See, e.g., *United States* v. *Davis,* 443 F.2d 560, 564-565 (5th Cir. 1971); and *United States* v. *Walton,* 411 F.2d 283, 290-291 (9th Cir. 1969).

CONCLUSION

Because of the serious factual errors recited by the Court in its opinion, this Petition for Panel Rehearing should be granted. This Court should reconsider this case fully in light of the correct facts, and upon rehearing, it should reverse and remand this case for a new trial.

To the extent that this Court has announced that "the evidence of [the defendant's] guilt is extremely strong", the defendant points out to the Court that the same evidence presented in this case, with the single exception of Etley's testimony, was presented to two other juries, one of whom found the defendant not guilty and the other being unable to agree as to his guilt or innocence. This petition should be reviewed in that light since both of the issues discussed herein are peculiar to only this effort by the government to convict the defendant.

Respectfully submitted,

BRUDER & COOPER

2514 Cedar Springs
Dallas, Texas 75201

By: _____
MELVYN CARSON BRUDER

Certificate of Service

I, Melvyn Carson Bruder, counsel for the defendant herein, hereby certify that on this the 5th day of December, 1980, I served one copy of the foregoing Petition for Panel Rehearing upon counsel for the government, Ms. Shirley Baccus-Lobel, by mailing the same to her via United States Mail, in a suitable wrapper with sufficient prepaid postage affixed thereto, addressed to Ms. Shirley Baccus-Lobel, United States Courthouse, 1100 Commerce Street, Dallas, Texas.

MELVYN CARSON BRUDER

Shank, Irwin, Conant, Williamson & Grevelle
Dallas, Texas 75202
May 25, 1979

[Printers Note: Text of letter illegible]

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Unit A

No. 79-5392

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MACK ELMOND COTTON,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(December 22, 1980)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Unit A

No. 79-5392

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

MACK ELMOND COTTON,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ORDER:

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 17, as amended January 22, 1979.

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____ the stay to continue in force until the final disposition of the

case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

(✓) The motion of Appellant _____ for a further stay of the issuance of the mandate is GRANTED to and including February 20, 1981, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

/s/ Reynaldo G. Garza
UNITED STATES/CIRCUIT JUDGE